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United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA HOMESTAKE MINING COMPANY, a Corporation
Appellant,

vs. *No.*

R. A. W. KRAMPITZ,
Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR APPELLANTS

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STATEMENT OF THE CASE

Appellant owns a mine on two mining claims in Valdez precinct, Territory of Alaska, Third Division. In May, 1918, it made a lease of this mine to two men, supplementing a previous one made the preceding October. The new lease was stipulated to expire in October, 1922. By its terms the lessees were to operate the mine under the usual provisions of such leases and were to pay a royalty of 12½ per cent gross on all mineral production. The entire mineral output was

stipulated to be delivered to the First Bank of Valdez, which was to have the same reduced and when the proceeds were received was to place 87½ per cent to the credit of the lessees and 12½ per cent to the credit of the lessor. It was further stipulated that all machinery, tools and equipment of every kind placed upon the ground was to remain there and upon the determination of the lease either by expiration of the term or by forfeiture, was to become the property of the lessor. Provision was made for working the mine steadily, with a stipulation that if the lessees failed for thirty days to work the mine, except under certain saving conditions, the lease should thereupon forfeit automatically. Soon after the lease was executed it was assigned to the Free Gold Mining Company, a corporation, which operated the mine until about January 8, 1920. For several months previous to that date defendant and other miners had been employed by the Free Gold Company. Before any of them began work at the mine, the appellant, owner of the ground and reversionary owner of the machinery, tools and other equipment, posted a notice in three places about the mine, in form required by the lien law of the territory, stating that it would not be liable for wages of employes of the Free Gold Company. This notice referred to the record of the lease in the office of the recorder of the precinct, giving book and page, as required by the law. (R. 27.) Soon after they stopped work the men filed liens against the machinery and equipment and the last production, about 66 ounces of gold amalgam.

Thereafter, on March 19, 1920, defendant, for himself and as assignee of the other lien claimants, filed suit in the district court of Alaska to foreclose the liens, making the Free Gold Mining Company sole defendant. Default judgment was entered and in due course the property upon which the liens were claimed was sold and was bought by the plaintiff in that suit, defendant herein. By that sale he became the purported owner of practically all the machinery and equipment and all the gold amalgam.

Thereafter plaintiff filed suit to have the judgment in the lien foreclosure set aside so far as it affected plaintiff's alleged property rights; to-wit: The reversionary interest in all machinery, tools and equipment on the ground, taking effect at the termination of the lease as provided by its terms, and the royalty of 12½ per cent of the gold amalgam. The court ordered the case re-opened for determination of plaintiff's rights, and after a hearing ordered the suit dismissed. From that order and judgment plaintiff prosecutes this appeal.

ASSIGNMENTS OF ERROR

1.

The Court erred in denying plaintiff's motion to strike the affirmative defenses set up in defendant's answer.

2.

The Court erred in overruling plaintiff's objection to the following:

MR. REED.—This was along in the fall of 1919, when Bill Quitsch was operating down there. I will ask you also in this connection, weren't there several papers drawn up in which efforts were made to get the men who went down there to work, to forego any claims of lien upon the property?

MR. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

3.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. And at one time did you present to him a waiver of lien on this property down there, in case he went to work for the Free Gold Mining Company?

MR. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

4.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. (By Mr. REED.)—I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether in view of the no-

tices that were posted on their claims would be collectible, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Mr. RITCHIE.—We object to that as irrelevant for the reason that no statement made by Mr. Quitsch could be binding on the Homestake Mining Company. It would be a matter of legal opinion anyhow. He was manager of the Free Gold Mining Co., not of the Alaska Homestake.

The COURT.—I will overrule the objection, pro forma, and it will be considered in connection with the legal phase of the whole matter.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—We object to any conversation between these men, between Mr. Quitsch and these claimants, as to their rights.

By the COURT.—He may ask if he told them that, and it will be considered the same as the other question.

Plaintiff allowed an exception to the ruling.

5.

The Court erred in overruling plaintiff's objection to the following question:

Q. (By Mr. REED.)—And is it not a fact that up to March 19th, which is the date that this suit was filed to foreclose those liens—did you not at a great many times between January 8th and March 19th, try to induce these men not to commence this suit, hoping to get the financial affairs of the Free Gold Mining Company straightened out?

Mr. RITCHIE.—We object to that as irrelevant and incompetent; first, because Mr. Quitsch was not representing the plaintiff in this case, the

Alaska Homestake Mining Company. In the second place there was an automatic forfeiture on the 31st day after the Free Gold Company ceased work; and finally there is no lien given by the sweeping Alaska lien law on personal property except particular machinery such as dredges and mills.

Objection overruled, pro forma, and exception allowed.

6.

The Court erred in refusing to strike from the record certain questions propounded by the Court to the witness Dimond and Mr. Dimond's answers, said questions being in part as follows:

Q. Do you know about the employment of these men whose liens are involved here—do you know of their original employment?

A. No, Mr. Quitsch was manager; he employed them.

Q. This paper that you drew up here, while it is not in the record—that was made on the part of the company, to get men to accept employment at that time and to take their pay on bedrock—take their pay out of the cleanups?

* * * * *

Q. Are any of these claimants in this case stockholders?

* * * *

Mr. RITCHIE.—In order to keep the issue clear, I move to strike the questions propounded by the Court to Mr. Dimond and Mr. Dimond's answers thereto.

Motion denied; plaintiff allowed an exception.

7.

The Court erred in overruling plaintiff's objection to the following question propounded by Mr. Reed to the defendant KRAMPITZ:

> Q. Just describe the building in which it was placed—how about the side walls? Were they thick walls or just one boarded wall?
>
> Mr. RITCHIE.—We object to that as the buildings are not in issue.

8.

The Court erred in overruling plaintiff's objection to the following propounded by Mr. Reed to the defendant KRAMPITZ:

> Q. Now in regard to the conversation which occurred prior to January 8th in the concentrator room, at which Mr. Quitsch was present and Nick Meckem was present—state what that conversation was?
>
> Mr. RITCHIE.—We object to the conversation as incompetent and irrelevant and not binding on the Homestake Mining Company.
>
> Q. And what Mr. Quitsch said about it?
>
> The objection was overruled and plaintiff allowed an exception.

9.

The Court erred in overruling plaintiff's objection to the following question:

> Q. (By Mr. REED, to Defendant KRAMPITZ.)—Now after your liens were filed on January 10th, did Mr. Quitsch have any conversation with you and the other lien claimants in re-

gard to not bringing an action to foreclose your lien?

Mr. RITCHIE.—We object, as irrelevant and incompetent.

Objection overruled; plaintiff excepts.

10.

The Court erred in denying plaintiff's motion to strike the testimony of defendant KRAMPITZ as follows:

Mr. RITCHIE.—I desire to move to strike all of the witness's testimony as to conversations with Mr. Quitsch about his wages.

Motion denied; plaintiff allowed an exception.

11.

The Court erred in denying plaintiff's motion to strike from the record the following questions by the Court, and answers thereto, propounded to the witness, defendant KRAMPITZ:

Q. You have talked to these men who assigned these claims to you, at the time they went to work and during the time they worked, about their claim?

A. Yes, sir.

Q. And you say they went on the theory that the machinery was good for their wages?

A. That is what we thought, it ought to be, but I wasn't sure. Somebody made a remark about that notice posted up there and Mr. Quitsch said then, the machinery ought to be good for it because that don't apply to this notice.

Q. You never went to look at the lease itself?

A. No.

Mr. RITCHIE.—At this time we move to strike from the record and the consideration of the Court the discussion just held by the Court with the witness as to his understanding and conversations.

Motion denied; plaintiff allowed an exception.

12.

The Court erred in overruling plaintiff's objection to the following questions propounded to the witness William Holland:

Q. (By Mr. REED.)—I will ask you, before you went down there, was anything said to you at the time by Mr. Quitsch as to waiving your lien rights, was any paper presented to you?

A. Yes, sir.

Q. And did you sign it?

A. No, sir.

Mr. RITCHIE.—All these questions go in under my objection.

Objection overruled and exception allowed.

13.

The Court erred in overruling plaintiff's objections to questions propounded to the witness Holland as to conversations with Mr. Quitsch, as follows:

Q. (By Mr. REED.)—Now you had conversations with Mr. Quitsch after he came to Valdez?

A. Yes, sir.

Q. State if you recall what he said about filing suits?

Mr. RITCHIE.—We object to any conversations between the witness and Mr. Quitsch after he quit work.

Objection overruled; plaintiff excepts.

14.

The Court erred in overruling plaintiff's objection to the following questions propounded to the witness Holland by Mr. Reed:

> Q. He (Quitsch) came to Valdez and then returned and after he returned what did he tell you, what did he tell the boys in regard to their work?
>
> Objected to as irrelevant.
>
> Objection overruled; plaintiff excepts.

15.

The Court erred in overruling plaintiff's objection to the question propounded to the witness Bouse, deputy United States marshal, referring to a claim filed with the marshal upon the 12½% interest in the gold product from the mine, as follows:

> Q. (By Mr. REED.)—I will ask you, was there any affidavit or any other claim of interest filed in regard to any of the other property that was sold in this suit?
>
> Mr. RITCHIE.—We object, on the ground that there is no foundation for it in the pleadings.
>
> Objection overruled; plaintiff allowed an exception.
>
> Q. Was there any other claim of interest, in regard to this machinery, by the Alaska Home-Stake Mining Company or any one else prior to the sale on June first of the machinery?
>
> A. No, sir.
>
> Same objection. * * * * *
>
> Mr. REED.—Mr. Bouse states that the Alaska Homestake Mining Company prior to this did not

make any claim to their interest or title in this property.

Mr. RITCHIE.—And we move to strike that much of the record because there is nothing contained in the pleadings that has any reference to it.

Motion denied and exception allowed.

16.

The Court erred in making the Finding of Fact set forth in plaintiff's first exception to the Findings, as follows:

> Plaintiff excepts to the finding set forth as part of the first finding of fact, in the sixth and seventh lines thereof, that plaintiff was "doing business within the Territory of Alaska," on the ground that no testimony was offered to show that plaintiff was transacting any business in the Territory of Alaska other than exercising ordinary rights of ownership of two mining claims admitted to be owned by plaintiff.

17.

The Court erred in making the Finding of Fact set forth in plaintiff's second exception to the Findings, as follows:

> Plaintiff excepts to the finding contained in the tenth finding of fact that the following machinery and equipment are personal property, to-wit:
>
> 1 7 ft. Lane Mill, 1 25 h. p. Foos engine; steel rails, cars, pipes, beltings, pulleys, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks-Morse gas engine and equipment; one 7 by 8 inch Dodge Crusher; one 6 h. p. Fairbanks hoist engine and cable, one Gibson Mill and

equipment, including concentrators and three amalgam plates

on the ground that the said finding is contrary to the evidence.

18.

The Court erred in making the Finding of Fact set forth in plaintiff's third exception to the Findings, as follows:

> Plaintiff excepts to the finding contained in the 11th finding of fact that none of the property described in the second exception was annexed to the ground, for the reason that said finding is contrary to the evidence.

19.

The Court erred in making the Finding of Fact set forth in plaintiff's fourth exception to the Findings, as follows:

> Plaintiff excepts to all of said 11th finding of fact which in referring to the property described in the 10th finding of fact makes the following recital:
>
> "That all of the same excepting said gold retort are within the definition of the term 'mill' or 'machine' as defined in said session laws placed at the mine or on said mining claims and used in connection with the operation thereof, the same not being fixtures and included in the term 'mine.' That said gold retort is within the third class of property defined in said session laws defined as dump or mass of mineral bearing sands, earth, ore, rock, etc.

On the ground that the said recitals are not findings

of fact but conclusions of law, and are too indefinite to have legal effect, either as findings of fact or conclusions of law.

20.

The Court erred in making the Finding of Fact set forth in plaintiff's fifth exception to the Findings, as follows:

> Plaintiff excepts to the finding in the 12th finding of fact that all of the property described in said tenth finding of fact "was and is at all the times mentioned and at the times when said labor was employed personal property" on the ground that the same is contrary to the evidence.
>
> Plaintiff excepts to the finding in said 12th finding of fact "that all of said machinery and equipment was placed upon said mining claims by and belonged to and the ownership thereof was in the Free Gold Mining Company, save and except, one 2 h. p. Fairbanks-Morse engine, and one Gibson Mill and equipment" upon the ground that said finding is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed upon the ground by the Free Gold Mining Company, and further because said finding is irrelevant to the issues in the case.
>
> Plaintiff excepts further to the finding contained in said 12th finding of fact that "upon none of said property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein, in direct terms or otherwise than as could be inferred from said lease" for the reason that the undisputed evidence shows that notices were posted in three conspicuous places on the ground, one of them

at the entrance to the mill building containing most of the machinery and equipment described.

21.

The Court erred, in making its Conclusion of Law upon the Findings of Fact, as follows:

> That by reason of the foregoing findings of facts that defendant's liens, equities, rights, and title under said judgment, decree and sale to each and all items of personal property described in the tenth Finding herein are superior to and prior to any right or claim of plaintiff herein, and that defendant is entitled to have said action dismissed and to recover his costs herein.

22.

The Court erred in entering judgment against the plaintiff and in favor of the defendant.

ARGUMENT

Inspection of the assignments of error will show that they are mainly to admissions of testimony objected to by plaintiff. Whether this testimony was an important factor in producing the judgment may be difficult to determine. The record shows that nearly all the testimony offered by defendant was objected to, and plaintiff urges here that practically all that testimony was incompetent and irrelevant, as well as all the evidence brought out by the trial judge, and should not have been brought to the attention of the Court at all.

Appellant contends that only one issue was before

the court—the legal effect of the notice posted on the ground by appellant notifying all persons interested that it would not be liable for wages of employes of the lessee, Free Gold Mining Company. The posting of the notice and its contents were undisputed in pleadings and evidence. Actual knowledge of the notice by the miners was also admitted. (R. 81.) The description and situation of the machinery and equipment were undisputed. Witness Quitsch described this property and defendant gave practically the same description.

Before taking up the assignments of error appellant wishes to direct the attention of the Court to the Alaska lien law, under which the liens in question were claimed and filed. The law is Chapter 13 of the Session Laws of Alaska, 1915. It is very long and with much detail seeks to cover every kind of mining work and to give a lien with few exceptions. One of these exceptions is involved in this case, providing for notice of non-liability by an owner of leased ground. Two sections of the law are to be read with the notice given in this case in order to determine its effect. They are the following:

> Sec. 2. When two or more mining claims, lodes or deposits are contiguous and are owned or claimed by the same person or persons, and are worked through a common shaft, pit, tunnel, incline or other opening, or over one tram, or at one mill or reduction works, then all mining claims, lodes or deposits, so owned, claimed and worked, and all roads, trams, tramways, ditches, flumes, pipe lines, buildings, structures, super-

structures and machinery which is a fixture thereto, thereon and used in connection with the working thereof, shall, for the purposes of this act, be considered one mine.

Sec. 3. All work and labor performed in, on or upon a mine or mining claim at the instance of any person in privity with, or having the right of possession, or privilege of working or mining thereon from the owner or his authorized agent, in prospecting, opening up, developing, mining, or in doing any other class of work necessary or convenient to the opening up, development or mining of such mine or mining claim, or the separation or reduction to a commercial value of the minerals therein, thereon, or extracted therefrom, shall be deemed to have been done at the instance of the owner of the mine or mining claims, and such owner's interests therein shall be subject to any lien filed in accordance with the provisions of this act, unless such owner shall, within ten days after he shall have obtained knowledge of such work or labor being performed, give notice that he will not be responsible for the same, by posting notices in writing to that effect, in three conspicuous places on such mine or mining claim; and should said mine or mining claim be worked or mined by a lessee under a written lease or lay, or under a bond or contract of sale from the owner or executed by his authority, such lease, bond or contract must be recorded in the precinct records of the precinct wherein the mine or mining claim is situated, and the notice of non-liability aforesaid shall refer to the record of such recorded instrument. All work and labor done on, in and about a dredge, steam shovel, mill or ma-

> chine, used in mining and on account of which the same is subject to a lien under the provisions of this act, at the instance of any person having the right of possession or right of use thereof from the owner thereof, shall be deemed to have been done at the instance of the owner of said dredge, steam shovel, mill or machine, and the interest of such owner therein shall be subject to the lien provided for herein, unless such owner shall within ten days after he shall have obtained knowledge of such use give notice of his interest therein, and that he will not be responsible for the work and labor involved in such use by posting a notice in writing to that effect in a conspicuous place on such dredge, steam shovel, mill or machine.

It was admitted, and was stated in the findings of fact made by the Court (R. 105-107), that before any of the men whose liens were claimed in the foreclosure suit began work the following notice was posted in three conspicuous places on the ground, to-wit:

> "Notice is hereby given that the Alaska Homestake Mining Company is the owner of the mining claims known as the Camp Bird No. 1 and Camp Bird No. 2, near Harriman Fjord, Valdez Precinct, Territory of Alaska; that said claims were leased to J. E. Whalen and William Quitsch by lease which appears of record in the office of the commissioner and recorder of said Valdez precinct in Book 27 at pages 257-8-9-260, and supplemental lease which appears of record in said recorder's office at pages 355-6-7-8-9-360 of said Book 27; that said lease was assigned by said lessees to the Free Gold Mining Company, a corpo-

> ration, by assignment which appears of record in said recorder's office in Book 27 at pages 364-5-6. Notice is further given that all work being done on said mining claims or to aid in their development or operation is done under and by virtue of said lease by the lessees or their assigns, and said Alaska Homestake Mining Company will not be responsible for any wages of employes engaged in any kind of work upon said claims or in aid of mining operations thereon."

Plaintiff reiterates that the sole issue to be determined is the legal effect of this notice read in the light of the sections of the law just quoted, and the provisions of the lease which appear in this record, beginning on page 10. Section 2 of the law provides that when mining property is held under one ownership it shall, with all improvements and fixtures, constitute one mine. Section 5 provides that the owner of a leased mine may protect himself against liability for wage debts of his lessee by posting notices on the ground.

It was contended by defendant, as shown by his pleadings, that the notice protected only the mining claims. If this is true then section 2, plainly designed to make the miner's lien co-extensive with the mining property, only operates in favor of the lien claimant, and a description sufficient to carry a lien is insufficient to support a notice of non-liability. Plaintiff submits that no such construction is logical or reasonable. The object of the section seems to have been to simplify descriptions. The legislature enacted a law giving miners a lien upon mining ground with all ap-

purtenances and improvements. It provided that all should be regarded as a single property, precisely as a deed of a city lot carries with it all buildings unless excepted. A deed of these mining claims would have conveyed everything annexed to the land. Why should it be necessary to give a more detailed description of property in a notice of non-liability than in a notice of lien?

Proof that only the generic description of the mine or mining claims is necessary in such a notice may be found in section 5 of the act, already quoted. It requires that the lease be of record and that the notice refer to that record. By consulting that record any person interested can find the exact rights of lessor and lessee in the property.

Defendant contended in his answer that all the machinery on the mining claims was personal property and that to protect it against liability for labor it was necessary for the owner to post a notice on each and every chattel. (R. 34.) At least that is the only logical deduction that can be made in view of defendant's denial that posting three notices on the ground exempted anything else, regardless of its situation or character.

The Oregon supreme court has passed adversely upon all of defendant's claims in construing a lien law very similar to the Alaska law. Some parts of the Oregon law (Sec. 5668 B. and C. Code) read almost word for word with parts of the Alaska law. As the Oregon law was prior in time it is a fair presumption that the Alaska law was modeled in part upon the for-

mer. The Oregon law, like the Alaska law, provides that all mining properties owned and worked together shall constitute one mine. It provides further:

> "That this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill or millsite, when the same shall be worked by a lessee or lessees, provided, a lessor of any such mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill site, or mill, shall have recorded in the mining records of the county wherein any such mine is located a copy of any such lease before the work shall have begun on any such property."

Construing this last section the Oregon supreme court in Lewis. vs. Beeman, 80 P. 417, held that under it "no lien can be enforced against mining property for labor performed where the lease was recorded before the work was begun." Citing Stinson vs. Hardy, 27 Or. 584, 41 P. 116.

The Alaska law gives more notice to the miner than the Oregon law. The latter merely requires the lease to be recorded and it becomes at once constructive notice. The Alaska law requires the lease to be recorded and further requires three notices of the owner's claim to be posted in conspicuous places on the ground and the notices must refer to the record. Of what use is the reference to the record in the notice if not to inform the miner how he can ascertain what property he has a lien upon? In Stinson vs. Hardy, *supra,* the court said:

> "By the act it is declared that the lien shall not

> be deemed to apply to the owner or owners when the same shall be worked by a lessee or lessees. The spirit of the act would seem to imply that when the mine is worked by some person other than the owner, who himself has an interest independent of such owner, and absolutely independent of his supervision and control, a lien claimed for work performed or materials furnished the person having such interest should not apply as against the owner or owners of the mine, and hence the lien claimed in the case at bar cannot affect the reversionary interest of the owners of these mines."

The Oregon supreme court also disposed under the same law of the contention that in describing a mine it is necessary to describe artificial attachments separately. This was in Washburn vs. Inter-Mountain Mining Co., 109 P. 382. Referring to the provision that "roads, tramways, trails, flumes, ditches or pipe lines, buildings, structures, etc., shall for the purposes of this act be deemed one mine, the court said:

> The reference, in this language to 'roads, tramways, flumes, ditches or pipe lines,' etc., includes such appurtenances when not situated upon the mine, as those upon the mine are part of the realty and need not be specifically mentioned. And so the use of the term 'upon any millsite or mill used, owned or operated in connection with such mine,' in section 5668, prior to the amendment of 1907, had reference to such millsite and mill not situated upon the mine, as is further shown by the subsequent language of that section. Therefore, the section as amended necessarily includes the millsite

and mill situated upon the mine without being specially named.

This brief has already referred to the similarity of language in certain sections of the Oregon and Alaska laws in providing that improvements and appurtenances shall with the land constitute one mine. Plaintiff at this point directs attention to section 13 of the Alaska law, which provides that the term mine in a lien notice includes contiguous mining claims and all improvements, appurtenances and machinery, describing such appurtenances at great length, and then proceeds:

> "And the term 'mining claim' shall be construed to mean any parcel of land containing minerals, which has been acquired, or possessed or held under the mining laws of the United States, together with all deposits, veins or lodes contained therein; and all machinery, structures or superstructures beneath the surface of the ground; and all shafts, tunnels and openings sunk or driven thereon; and all machinery, structures and superstructures on the surface and affixed thereto."

Taking up the assignments of error, and temporarily passing over the first, plaintiff directs attention briefly to assignments 2 to 15, inclusive. All these raise questions of inadmissibility of testimony. Plaintiff submits that all the testimony objected to was wholly incompetent and irrelevant. Defendant was allowed to introduce testimony as to "understandings" and conversations between Quitsch, manager for the Free Gold Company, and the lien claimants, both before and after they had ceased to work. It was not

pleaded by defendant that Quitsch represented the Alaska Homestake Company (appellant), nor was any offer made to prove that he did. Clearly, agreements made between Quitsch and the men, under the pleadings and admitted facts, were incompetent and irrelevant for any purpose. It was not even claimed that anyone representing the Alaska Homestake was present at any of these conversations.

The 17th assignment of error attacks the finding of fact that the machinery and equipment sold under plaintiff's judgment is personal property, and the 18th the finding that none of said property was annexed to the land. William Quitsch testified that the Lane mill, the Foos gas engine, the Fairbanks-Morse engine, the Ingersoll air compressor, and Dodge crusher were set on heavy timbers, banked in the gravel and bolted to the timbers. The hoist was inside the mine. The steel rails were laid in the tunnel for a track and so used. (R. 54-5-6-7-8-9.) This testimony was not contradicted. Answering a question by the Court Quitsch said:

> Q. Was the intention in putting in this mill and the other machinery there that it was to remain there permanently as working machinery for the mine?
>
> A. Yes, that was the intention. I had nothing to do with the management of the company at that time.
>
> By Mr. RITCHIE.—You have read the lease and you understand thoroughly that it provides that everything put on by the Free Gold Mining Company during the period of the lease should remain there—that was the agreement?

A. Yes, all tools and equipment and machinery —it was my understanding that way. (R. 59.)

Plaintiff urges that these findings were contrary to the undisputed evidence. In determining whether mining machinery is a fixture, the modern rule seems to be well stated in Alberson vs. Elk Creek M. Co., 39 Or. 552, 65 Pac. 978, where it was held that three conditions control: annexation real or constructive; adaptability to the use of the realty; and the intention of the party making the annexation. In this case the machinery was placed as such machinery usually is for permanent use. The location of all of it, in view of the description of the premises, indicates that it was unlikely to be moved as long as the mine is operated. It is adaptable to the purposes of permanent mine operation. As to the intention, the testimony of Quitsch that it was intended to be placed permanently is corroborated by the lease itself, which provides that all machinery and equipment placed on the ground by the Free Gold Company shall remain. (R. 12-13.) As to the steel rails, plaintiff has been unable to find any prior case in which rails laid as a track on or under the ground were held to be personal property. Plaintiff further submits that while some of the articles enumerated in the findings are undoubtedly chattels they do not come under the description of "dredge, steam shovel, mill or machine," which are the only chattels upon which the Alaska lien law gives a lien. If a pipe line 400 feet long, in place and used for carrying water it not a part of the realty it is hardly a dredge, steam shovel, mill or machine. Beltings, pulleys, etc., were

attached to the machinery, which is claimed by plaintiff to have been part of the permanent improvements affixed by the land. Clearly their legal status would be the same as other machinery of which they were a part. The description of the property, taken in connection with the testimony showing the situation of the machinery upon the land, is easily understood by any person familiar with mines and mining machinery. The test of permanent improvements placed in the mine set forth in Alberson vs. Elk Creek M. Co., *supra,* by the Oregon supreme court, is approved by the Washington Supreme Court in Gasaway vs. Thomas, 105 P. 168, wherein the same definitions and rulings were made as in the Alberson case. To the same effect is the opinion in Mineral Creek M. Co. vs. Ramsey, 4 Alaska 734, a case decided in 1913 in the Third Division of Alaska, from which this appeal is taken.

In the Mineral Creek case the opinion of the court discusses the law exhaustively, citing many late decisions on the subject of permanent improvements to mines. The court laid down the same rules as in the Oregon and Washington cases above cited. On the particular facts of that case the court held that the machinery was not permanently placed because the undisputed testimony showed that it was only intended for experimental purposes.

Strenuous efforts were made by counsel for the defendant in this case to convey the impression that the heavy machinery was not annexed to the land, for the reason that it might easily be removed, and incidentally to show by testimony that if it were removed no special

injury would result to the land or the buildings. It is not disputed that the buildings are flimsy and of no great value. As to the point that the machinery could be removed without injury to the land, it is hardly necessary to suggest to this Court that the building in which its sessions are held or any other building in the city of San Francisco can be removed without injury to the land. It is unnecessary to suggest further by way of argument that heavy machinery and frame buildings, although annexed to the land for permanent use, can nearly always be easily moved. The most important test in determining the character of improvements to land is the use for which they are intended and the intention of the parties in placing them where they stand.

The 20th assignment of error in its first paragraph raises the same contention as the 17th and 18th. The second paragraph of this assignment points out that the finding made by the court that all the machinery and equipment, with certain exceptions noted, belonged to the Free Gold Mining Company is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed on the ground by the Free Gold Company, and that said finding is irrelevant to the issues. It seems superfluous to make more than passing reference to the fact already pointed out in this brief and admitted in the record, that the Free Gold Company by the terms of its lease was forbidden to move from the premises at any time, any improvement placed by it upon the land, or any chattel, even the smallest tool. This being true it is clear that a

creditor of the Free Gold Company could in no instance unless expressly authorized by law, sell any of the machinery or tools to be carried away from the premises. So long as the lease of the Free Gold Company continued a creditor could attach or sell upon execution the rights of the Free Gold Company under the lease, but under no circumstances could the reversionary interest be sold. That being the case the whole issue reverts back to the sufficiency of the notice of non-liability heretofore discussed.

The third paragraph of assignment 20 excepts to the finding that "upon none of such property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein in direct terms or otherwise than as could be inferred from said lease," for the reason that the undisputed evidence shows that notices were posted in three conspicuous places on the ground, one of them at the entrance to the mill building containing most of the machinery and equipment described. This raises the issue of the sufficiency of the notice.

The 19th assignment of error raises the question of the ownership of the 12½ per cent of the gold amalgam claimed by plaintiff as royalty under the terms of the lease. The plaintiff excepts to the finding on the ground that the recitals are not findings of fact but conclusions of law and are too indefinite to have legal effect either as findings of fact or conclusions of law.

By referring to the lease (R. 22) it will be noted that it called for a royalty of 12½ per cent. The original lease (R. 18) provided that all gold taken

from the premises should be deposited by the lessees in the First Bank of Valdez, and by the bank forwarded to a United States assay office, and that upon receiving returns from each shipment the bank should credit the lessees and lessor respectively with the amount due each. This provision was unchanged in the supplementary lease. It appears to plaintiff as a legal conclusion that this agreement made the bank trustee for the parties, each separately, upon deposit of the gold in the bank, and that the lessees ceased to have any interest in or control over the 12½ per cent belonging to the lessor. It was contended by defendant in the trial court that the relation of debtor and creditor existed between lessee and lessor and that the lessee simply owes the amount of the 12½ per cent to the lessor. This might be true if the lease had provided that lessee should ship the gold product to the assay office and upon receiving the returns should pay the lessor its royalty, but under the provision of the lease plaintiff insists that defendant's position is wholly illogical and untenable.

Defendant contended that under Section 1 of the Alaska lien law all the product of the mining ground is liable for labor engaged in producing it, and a superficial reading of the particular provision referred to might lead to that conclusion, but upon reading other provisions of the law in connection with the one involved it seems a fair conclusion that the legislators intended the notice of non-liability to apply to royalties belonging to lessors as well as to the remainder of the property.

A further objection to this finding or conclusion, whichever it may be, lies in the fact that the construction contended for by defendant brings the Alaska lien law in direct conflict with the Congressional law governing public records affecting lands in Alaska. Section 379 of the Alaska Code of 1913 provides for public records to be kept by commissioners as ex-officio recorders. Section 499 *et seq* provides for filing of conveyances of lands or of any estate or interest therein. Section 561 provides that the term "lands" as used in Chapters 13, 14 and 15 of the same title shall be construed as coextensive in meaning with "lands, tenements and hereditaments" and the term "estate and interest in lands" shall be construed to embrace every interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined.

Reading all these provisions of the Alaska Code it will be seen that they provide that any interest in land is fully protected against all conflicting claims when the title documents describing the interest is on record in the proper recording office. This provision protects a record title against any form of conflicting invasion. If the Alaska lien law attempted, which plaintiff does not concede, to place lien rights above pre-existing record titles the provision is ultra vires and void.

It is true that labor lien laws are expressly designed to save the laborer his wages as far as possible and their beneficent purpose is admitted. However, no law protects a man against his own negligence, and it is plain that the law in providing for a notice of non-

liability by an owner of a leased mine intended to protect the owner and at the same time give notice to the laborer of the precise property upon which he might rely to secure his wages. There is no reason in natural justice why a miner who works for the lessee of a mine, with notice that his wages must come out of the interest of the lessee, should afterward be permitted to come into court and demand that the interest of the lessor be also subjected to his claim. That is the demand of the defendant in this case.

The 21st assignment of error excepts to the Court's conclusion of law that defendant's equities in the premises are superior to those of the plaintiff. The 22nd assignment excepts to the judgment. No argument can make these exceptions any clearer, and the plaintiff only calls attention to the fact that in this case, as set forth in plaintiff's complaint, and in the tenth finding of fact, (R. 107) plaintiff was not made a party to the suit foreclosing the miner's liens in question and therefore was not bound by the judgment. It was because of this fact that the trial court ordered the judgment in the former case reopened in order that plaintiff might defend its interest. It may be worthy of mention that the Alaska lien law expressly provides that no party having an interest in the property involved shall be bound by a judgment of foreclosure unless he is made a party to the suit, and in so doing only follows fundamental law.

The 16th assignment of error raises an issue totally aside from the general merits of the case. It is admitted that at the time defendant's foreclosure suit

was instituted, at the time his judgment was rendered and at the time the property in dispute purported to be sold by the marshal, plaintiff, a foreign corporation, had not complied with the laws governing foreign corporations "doing business" in the Territory of Alaska. It is also admitted that plaintiff did comply with the law on June 5, 1920, several months prior to bringing this suit. Defendant's contention is that plaintiff was barred from bringing suit and that all his contracts with Alaska citizens were void under the provisions of Section 660 of the Alaska Code of 1913.

Plaintiff asserts that this contention is wholly untenable for two reasons. First, the lease involved was made in Seattle, in the State of Washington, the domicile of the Plaintiff. If it be contended that ownership of property in Alaska by a foreign corporation constitutes "doing business," then no corporation created outside of Alaska can own property in the territory without filing its articles there. If this is true a foreign corporation could not lawfully acquire title to Alaska property by any form of purchase or by operation of law before it had complied with the laws of the territory regarding "doing business." Second, "doing business" has been held by the United States Supreme Court repeatedly to be the continuous act of conducting a general business, not the making of a single contract or doing any other single act. It is hardly necessary on this point to go further than to cite the Court to the well known case of the International Harvester

Company in 235 U. S., where the whole subject is exhaustively discussed with ample reference to preceding decisions. If defendant's contention is correct, a foreign corporation could not take over a single piece of property in payment of a just debt without performing all the acts necessary to qualify itself to transact a general business in the territory, nor could it by any lawful means become possessed of a rentable piece of property in the territory and make a lease of the same without qualifying to do a general business. It seems hardly necessary to remind this Court that the object of the laws which exist in every state requiring a foreign corporation to file its articles and otherwise comply with reasonable regulations before doing a general business, is to place foreign corporations on the same basis with citizens of the state, individual and corporate, and the reason of the requirement is that foreign corporations may not engage in a general business and make contracts upon which it may sue citizens of the state, and at the same time exempt itself from legal liability on the same contracts by keeping itself out of reach of the process of the courts of the state. This reason does not apply to a single transaction.

The first assignment alleges error in the denial by the trial court of plaintiff's motion to strike the affirmative defenses of defendant's answer. While this may not have been important, plaintiff contends that a brief inspection of them will show that they set up no allegations that could avail as a defense. Allowing them to

remain in the record may have been harmless error, but it may also have afforded excuse for the admission of incompetent testimony.

For all the reasons stated plaintiff respectfully submits that the judgment of the trial court should be reversed.

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